

This order is SIGNED.

Dated: October 22, 2018

William J. Thurman

WILLIAM T. THURMAN
U.S. Bankruptcy Judge



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Counsel for Plaintiff Official Committee of Creditors Holding Unsecured Claims

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

In Re **CS MINING, LLC**

Debtor.

Official Committee Of Creditors Holding Unsecured Of
The Claims Of The Bankruptcy Estate Of Cs Mining,
LLC,

Plaintiff,

v.

David J. Richards, A Resident Of The State Of Ohio;
Clinton W. Walker, A Resident Of The State Of
California; And David McMullin, A Resident Of The
State Of Utah,
Defendants.

Bankruptcy Case No. 16-24818

(Chapter 11)

Judge William T. Thurman

Adv. Pro. No.: 18-02064

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS COMPLAINT (DOCKET #4) AND
MOTION TO STRIKE PLAINTIFF'S PRAYER FOR DAMAGES (DOCKET #5)**

Upon the motions (the “**Motions**”)¹ of the Defendants to Dismiss Complaint pursuant to Federal Rule of Bankruptcy Procedure 12(b)(1) and 12(b)(6) (Docket #4) and the Defendants’ Motion to Strike Plaintiff’s Prayer for Damages (Docket #5); and due and sufficient notice of the Motions having been given under the particular circumstances; and after consideration of the pleadings filed in support of the Motion, Opposition and Reply to the Motions, including the Operating Agreement of CS Mining, LLC (“**CSM**”) attached to the Motion to Dismiss, as well as the arguments of counsel made orally at the hearing on the Motions; and after due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

1. Jurisdiction is properly invoked under 28 U.S.C. §157 and 28 U.S.C. §1334.
2. With regard to the Plaintiff’s First, Second and Third Claims for Relief, the Court has jurisdiction over these non-core matters pursuant to 28 U.S.C. §157(c)(1).
3. With regard to the Plaintiff’s Fourth Claim for Relief (for Equitable Subordination), the Court has jurisdiction over this claim pursuant to 28 U.S.C. §157(b)(2)(B) and (O), and the Court has authority to enter a final order in this Adversary Proceeding on this Fourth Claim for Relief.
4. Venue is proper pursuant to 28 U.S.C. §1409.
5. The Motion to Dismiss is GRANTED IN PART AND DENIED IN PART as follows:
 - a. On Plaintiff’s First Claim for Relief, for Breach of Fiduciary Duty against Defendants Richards and Walker, the Motion to Dismiss is:

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motions.

(1) **DENIED** as to that portion of the claim that Defendants David J. Richards (“Richards”) and Clinton W. Walker (“Walker”) breached their fiduciary duty when they caused Debtor to enter into the Tenth Amendment to the WUMI Loan Agreement without seeking approval of the Debtor’s Board of Directors;

(2) **GRANTED** as to that portion of the claim that Richards and Walker breached their fiduciary duty by rejecting multiple proposals for much needed financing for CSM;

(3) **GRANTED** as to that portion of the claim that Richards and Walker breached their fiduciary duty by failing to take appropriate steps to ensure Debtor would not be exposed to substantial penalties in connection with the WARN Act; and

(4) **GRANTED** as to that portion of the claim that Richard and Walker breached their fiduciary duty by failing to authorize legal action to block WUMI from foreclosing upon CSM’s assets.

b. On Plaintiff’s Second Claim for Relief, for Breach of Fiduciary Duty against Defendant David McMullin (“McMullin”), the Motion to Dismiss is **DENIED**.

c. On Plaintiff’s Third Claim for Relief, for Negligence against Defendant McMullin, the Motion to Dismiss is **DENIED**.

d. On Plaintiff’s Fourth Claim for Relief, for Equitable Subordination against Defendants Richards, Walker and McMullin, the Motion is **DENIED**.

6. The Motion to Strike is GRANTED IN PART AND DENIED IN PART as follows:

- a. **DENIED** as to that portion of the prayer for damages relating to the claim for breach of fiduciary duty caused by the failure to take appropriate steps to ensure Debtor would not be exposed to substantial penalties in connection with the WARN Act;
- b. **GRANTED** as to that portion of prayer for damages relating to the claim that Richards and Walker breached their fiduciary duty by rejecting multiple proposals for much needed financing for CSM; and
- c. **DENIED** in all other respects.

7. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

DESIGNATION OF PARTIES TO RECEIVE NOTICE OF COURT ORDER

1 Service of the foregoing *Order Granting In Part And Denying In Part Defendants' Motion To*
2 *Dismiss Complaint (Docket #4) And Motion To Strike Plaintiff's Prayer For Damages (Docket*
3 *#5)* shall be served on the parties in the manner designated below:

4 **By Electronic Service:** I certify that the parties of record in this case, as identified below, are
5 registered CM/ECF users.

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- Martin J. Brill mjb@lnbyb.com
 - M. Darin Hammond dhammond@smithknowles.com,
astevenson@smithknowles.com
 - George B. Hofmann ghofmann@cohnekinghorn.com,
dhaney@cohnekinghorn.com;mparks@cohnekinghorn.com
 - Beth Ann R. Young bry@Lnbyb.com

10 **By U.S. Mail:** In addition to the parties receiving notice through the CM/ECF system, the
11 following parties should be served pursuant to Fed. R. Civ. P. 5(b).

12 *None.*

13 Dated: October 15, 2018

14 _____ /s/ Martin J. Brill _____

15 Martin J. Brill

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